



BOARD OF INQUIRY (*Human Rights Code*)

C Walker

IN THE MATTER OF the *Ontario Human Rights Code*, 1981, S.O. 1981, c.53, as amended;

AND IN THE MATTER OF the complaint by Dena Potocnik dated October 25, 1988, alleging discrimination in employment on the basis of age and sex.

B E T W E E N :

Dena Potocnik

Complainant

- and -

City of Thunder Bay

Respondent

INTERIM DECISION

Adjudicator : Lorne Slotnick
Date : October 27, 1995
Board File No: BI-0034-95
Decision No : 95-047-I

Board of Inquiry (*Human Rights Code*)
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IN THE MATTER OF a Board of Inquiry appointed pursuant to s.38(1) of
the *Human Rights Code*, R.S.O. 1990, c. H-19, as amended

BETWEEN:

DENA POTOCHNIK

Complainant

- and -

CITY OF THUNDER BAY

Respondent

INTERIM DECISION

Date of Complaint:	October 25, 1988
Hearing on Preliminary Matters:	September 12 & 13, 1995, Thunder Bay
Board of Inquiry:	Lorne Slotnick
Counsel:	Stephen Wojciechowski, Counsel for the Ontario Human Rights Commission Allan McKittrick, Counsel for Respondent

This is an interim decision relating to two aspects of disclosure: the Respondent is seeking pre-hearing disclosure of certain documents in the Commission's possession; at the same time, the Commission has had a wide-ranging summons issued seeking disclosure of documents by the Respondent, and the Respondent requests an order quashing the summons.

The complaint itself alleges that Dena Potocnik was discriminated against because she is a woman in the filling of the positions of Treasurer and Deputy Treasurer of the City of Thunder Bay in 1988. In addition, the complaint cites numerous other competitions for financial management jobs with the City, and alleges that hiring practices constitute constructive or systemic discrimination against women, contrary to what is now Section 11 of the *Human Rights Code*.

At the start of this hearing, counsel for the City outlined a large number of preliminary matters in dispute. After some discussion between the parties, many of these were resolved, including many of the issues related to disclosure.

It is now roughly seven years since this complaint was filed, and the City takes the position that the complaint should be dismissed because of delay and procedural unfairness. Counsel agreed that this issue would not be argued as a preliminary matter, because evidence on this issue would probably overlap with evidence on the complaint itself. However, some of the disclosure issues below relate to the City's plan to raise the delay argument.

Disclosure by the Commission to the City

The Commission acknowledges its obligation in light of the *Northwestern General Hospital* case (1993) 21 CHRR D/498 (Div. Ct.) to disclose the "fruits of the investigation". However, in this case, there is some dispute over precisely what documents should be considered the "fruits of the investigation." At the end of the first day of this hearing, I asked the Commission to provide to the City a list of items in its file that it was not prepared to disclose, and its reasons. The Respondent was then asked which of these items it was still seeking. This process resulted in some further agreement on disclosure, but three areas remain in dispute. The parties made submissions on these areas.

(a) Investigators' Dealings with Senior Commission staff

The first category of disputed documents in the Commission's file are described by Commission counsel as notes of calls, memos, and letters from Commission investigators to senior staff of the Commission, dealing with procedural questions at the investigation stage of the complaint.

The Commission argues simply that these documents cannot be described as the fruits of the investigation, and so need not be disclosed. Many of them, Commission counsel says, seek "what do I do next?" advice from senior staff.

The City says these documents must be disclosed because they are relevant to the argument it will be making on delay and procedural abuse. Respondent's counsel concedes that these documents are not the fruits of the investigation, but he argues that the documents are evidence that is relevant to an issue in the case, namely that of delay. He cites Rule 49 of the Board of Inquiry's Interim Rules of Practice (August, 1995), which allows a panel to order any party "to provide to any other party further particulars, physical or documentary evidence, expert(s)'reports, lists of witnesses and witness statements," and says this Rule essentially means the Commission is bound to produce any evidence germane to the complaint.

While these documents are clearly relevant to the question of delay, I think there is a distinction to be made between disclosure of documents related to the substance of the complaint and disclosure of the Commission's internal discussions on procedural matters related to the complaint. This inquiry was set up to determine the merits of the complaint, and procedural fairness requires that the City know the case it has to meet, including any evidence uncovered in the Commission's investigation which might tend to help the Respondents own case rather than the Commission's. The City has evidently decided that one method of attacking the complaint is to make the an argument regarding delay and procedural unfairness. The Respondent of course has a right to make this argument, but that does not entitle the Respondent automatically to pre-hearing disclosure of all the internal communications in the Commission's files.

The delay argument has been initiated by the party seeking disclosure. The Respondent, then, cannot claim that these documents must be disclosed to enable it to know the case it has to meet. In fact, I would expect that whatever evidence there is to support the delay is already in the possession of the Respondent -- the City and its officials presumably can tender evidence of the timing of various events and correspondence since the complaint originated, and can testify as to

the prejudice caused by any delays. If that evidence is compelling, the Commission may have some explaining to do, possibly in the form of some of the documents that are at issue now. But that is the Commission's decision, and I do not see any reason to compel disclosure of this portion of the Commission's file at this stage.

Further, I believe the Board of Inquiry has attempted to enshrine the disclosure obligations as laid out in the *Northwestern* case, in the form of Rule 47 in its Interim Rules. Rule 47 provides that the Commission "provide full disclosure of the information, witness statements, documents and evidence relating to the complaint" prior to the hearing. The phrase "relating to the complaint", in my opinion, is intended to encompass the fruits of the investigation into the substance of the complaint and is not intended as an obligation on the Commission to disclose documents dealing solely with procedural questions.

For these reasons, I will not order pre-hearing disclosure of documents that are internal communications dealing with procedural matters.

(b) Record of the Investigation

This is described by Commission counsel as an index or listing of all the documents in the file. The Commission objects to its disclosure, arguing that it may include reference to privileged documents and that disclosure is unnecessary if the Commission is already disclosing all the actual documents to which the Respondent is entitled. The City argues that there is no reason to keep it secret and that disclosure would enable the Respondent to check whether the Commission has actually disclosed all the fruits of the investigation.

I believe there is some value in having the Respondent feel confident that the Commission has met its disclosure obligations, and I order the Commission to disclose the Record of the Investigation. I am assuming that this Record does not contain a detailed description of the content of any document. In the event that it does, I will permit the Commission to black out any details, beyond a brief description, of a document it is not disclosing.

(c) List of the Complainant's Former Employers and Supervisors

The City is seeking from the Commission a list of Ms. Potocnik's employers and supervisors before she was first employed by the City in 1983. This is apparently a document that does not currently exist, although presumably the Commission could create it easily through information provided by Ms. Potocnik. The Commission argues that such information cannot be relevant to an examination of the process resulting in Ms. Potocnik being rejected for the positions she sought, since any information not already in the possession of the City could not, by definition, have been part of that decision making process.

I have some doubts about the relevance of such information, and in any event I do not believe the duty to disclose includes any obligation to create documents that do not already exist. I therefore do not order disclosure of this information.

The Summons

In September, 1995, the Commission served on three city officials -- the City Manager, the City Archivist, and the General Manager, Human Resources -- a Summons requiring them to attend the hearing and produce a wide range of documents, mainly relating to numerous job competitions. The City is not contesting parts of the Summons, and has agreed to provide pre-hearing disclosure of the documents sought in these uncontested portions. In addition, during the hearing on these preliminary matters the Commission dropped some material from the list of documents it is seeking through the Summons. These two developments helped narrow the issues in dispute.

Parts I and II of the Summons seek detailed documentation related to eight job competitions, all of which are mentioned in Ms. Potocnik's complaint. The City is not challenging these portions of the Summons, but because of concerns about its obligations under the *Municipal Freedom of Information and Protection of Privacy Act* the City wants an order from this Tribunal before disclosing the documents. Therefore, I order the City to disclose the documents outlined in Parts I and II of Schedule A to the Summons, prior to the hearing. As agreed by the Commission and the Complainant, they will be treated with confidentiality.

However, the City has asked me to quash the remainder of the Summons. These portions of the Summons read as follows:

Part V

With respect to the following individuals,...the qualifications of each individual at the time of entering into the said positions:

1. Paul Milligan

...

- b. Acting Treasurer (1988)
- c. Treasurer (1988)

2. Bill Young

...

- b. Acting Deputy Treasurer (1988)
- c. Deputy Treasurer (1988)

3. John Dunn

- a. Accounting and Administration Coordinator (1983)

4. Peter Kelos

- a. Accounting Supervisor (1983)
- b. Manager - Budgets and Planning (1984)

5. Tim Commisso

...

- b. Services and Financial Co-ordinator (1983/84)
- c. Manager - Budgets and Planning (1985)

6. Tom Mustapic

- a. Financial Analyst (1984)
- b. Corporate Development Officer (1985)
- c. Acting Manager - Budgets and Planning (1989)
- d. Manager - Budgets and Planning (1990)

7. Doug Strachan

- a. Accounting Supervisor - Financial (1984)

8. Gary Donadel

- a. Accounting Supervisor - Continuing Property Records (1984)

9. Kevin Burns

- a. Accounting Supervisor - Rates and Tariffs (1983)

10. Rob Colquhoun

- a. Financial Analyst (1987)
- b. Accounting and Financial Supervisor (1989-90)
- c. Capital and Revenue Control Supervisor (1990)
- d. Manager - Disbursements Division (1993/4)
- e. Manager - Revenue (1995)

11. Chuck Abey

- a. Manager - Budgets and Planning (1991)
- b. Manager - Financial Programs Division (1993/4)

.....

15. Veli Kraft

- a. Budget and Office Co-ordinator (Homes for the Aged) (1983)

.....

18. Sam Federico

- a. Tax Collector (1983)
- b. Billing Supervisor (1993/4)

.....

21. Dave Home

- a. Tax Supervisor (1983)

Part VI

With respect to the Job Positions listed in V above, any and all information in the possession or control of the Corporation of the City of Thunder Bay which relates to:

.....

3. Names of those supervising the said competition, or names of those approving and recommending the appointment of the named individual to the said job position, and all those involved in the selection process, as well as any documents or notes which they prepared in supervising the competition or making the decision to appoint the named individual;

4. Names of all those who applied for the said position, along with copies of their applications and accompanying documents;

5. Policies and procedures followed throughout the competition or appointment process including screening criteria used.

The City objects on a number of grounds to these portions of the Summons. First, the City argues that this evidence is irrelevant, in that many of these positions were awarded up to five years before the complaint was filed, and many were awarded after the complaint was filed. In effect, the City is saying the information being sought is either too old or too new to be relevant.

Second, the City says the Commission has not laid any groundwork for seeking this information. The Commission is said to be clearly on a fishing expedition. In fact, the City says, the Commission is only now -- seven years after the complaint was filed -- getting around to conducting its investigation, using this Summons as its tool.

In addition, the City says most of these documents have never been requested by the Commission in the seven-year history of this complaint until the Summons was served in September, 1995. The City questions the fairness of this first-time request for documents that are up to 12 years old. The City also raised concerns about privacy for the individuals who are the subject of the documents.

Background to the Summons

While this complaint does have a long history, it is clear that the Commission feels it still needs more information. The information requested clearly has some connection to the allegations in the complaint, but -- for whatever reason -- the Commission did not exercise its right to seek a search warrant in order to obtain the documents.

Counsel for the Commission acknowledges that the Commission has never requested the documents now being sought in the disputed portions of the Summons. He says the reason is that the City refused numerous requests by the Commission for documents related to the eight job competitions mentioned in the complaint. These are, by and large, the documents that are described in Parts I and II of the summons, and which the City has only now agreed to provide. Counsel argues, why would the Commission ask for a further batch of documents when it was repeatedly refused the first batch?

The City acknowledges that, until this hearing began, it refused to disclose the documents related to the eight job competitions mentioned in the complaint.

The *Human Rights Code* contains the following provisions relevant to this issue, giving the Commission and its agents certain powers during an investigation, and allowing the Commission some recourse where a party fails to co-operate with the investigation.

- 33 (3) A person authorized to investigate a complaint may,
- (a) enter any place, other than a place that is being used as a dwelling, at any reasonable time, for the purpose of investigating the complaint;
 - (b) request the production for inspection and examination of documents or things that are or may be relevant to the investigation;
-
- (6) If a person refuses to comply with a request for production of documents or things, the Commission may refer the matter to the board of inquiry or may authorize an employee or member to apply to a justice of the peace for a search warrant under subsection (7).
 - (7) Where a justice of the peace is satisfied on evidence upon oath or affirmation that there are in a place documents that there is reasonable ground to believe will afford evidence relevant to the complaint, he or she may issue a warrant in the prescribed form authorizing a person named in the warrant to search a place for any such documents, and to remove them for the purposes of making copies thereof or extracts there from, and the documents shall be returned promptly to the place from which they were removed.

The Commission argues that the clear meaning of subsection (6) above is that when the Commission is faced with a party that refuses to disclose documents, it has two options: it can apply for a search warrant, or it can refer the case to the Board of Inquiry for a hearing. If it refers the case to a hearing, then the board of inquiry has the power under Section 12 of the *Statutory Powers Procedure Act* to issue a summons requiring that documents be produced at the hearing. Section 12 (1) of the *Statutory Powers Procedure Act* reads as follows:

- 12 (1) A tribunal may require any person, including a party, by summons,
- (a) to give evidence on oath or affirmation at an oral or electronic hearing; and

- (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at an oral or electronic hearing,

In this particular case, no search warrant was requested. Counsel for the Commission gave no reason for this choice, but it appears from Section 33 (6) that the Commission has complete discretion in its choice of how to deal with a party that is refusing to co-operate: it can request a search warrant, or it can refer the matter to the Board of Inquiry for a hearing at which the summons power is available.

There appears to be little law on this aspect of the *Code*, Counsel for the City referred me to the case of *Guru v. McMaster University*, (1980) 2 CHRR D/253 (Ont Bd. of Inq.), in which the Board ruled that the Commission cannot use a subpoena as a method of discovery of documents. However, it is important to note that this ruling was made at a time when the *Human Rights Code* gave the Commission broader power to compel disclosure of documents during the investigation stage. Amendments to the *Code* have eliminated these options for the Commission. To quote from the *Guru* ruling (at paragraphs 2181 - 2185):

... [the *Code*] provides certain powers whereby the "Commission or an officer of the Commission may ... require the production for inspection or examination of employment applications, payrolls, records, documents, writings and papers that are or may be relevant to the investigation of the complaint. " Section 14(5) of the Code provides that "No person shall hinder, obstruct, molest or interfere with the Commission or an officer of the Commission in the exercise of a power or the performance of a duty under this Act or withhold from it or in [sic] any employment application, payrolls, records, documents, writings or papers that are or may be relevant to the investigation of a complaint."

S.15 of the *Code* provides a means of punishing any breach of the provisions of the Act. [The decision reprints the text of the section, providing for a summary conviction offence for contravening any of the provisions of the *Code*] ...

The Commission had every means, during the enquiry stage, of securing the documents it now seeks but apparently did not exercise its rights under s. 14, for this purpose ...

The legislature has provided for the form of production for inspection and examination of documents by the Commission or an officer of the Commission. I

have concluded that a power to issue a *subpoena duces tecum* does not provide an alternative method of securing this purpose.

The powers referred to in *Guru* that were used as the rationale to quash the subpoena no longer exist as part of the *Code*, and for this reason I believe the *Guru* case is of no assistance in deciding the present matter.

However, the discussion of this issue in Judith Keene's book *Human Rights in Ontario* (Carswell, 1992), at pages 301-301 is helpful:

... the present *Code* no longer empowers the Commission to require production of documents, or to prosecute when documents are withheld. The only options available to the Commission where the respondent refuses to produce documents are to apply for a search warrant, or to request the Minister to appoint a board of inquiry. In cases in which the most cogent evidence, or the largest part of the evidence, is likely to be found in documentary form, the Commission may have difficulty in either obtaining a search warrant or in appointing a board.

To date, two boards have maintained that section 12 [of the *S.P.P.A.*] is not to be used for discovery purposes. Both have apparently contemplated the appointment of a board of inquiry at an early stage of the investigation if permission to view documents is refused. In *Ryckman v. Board of Commissioners of Police (Kenora)* (1987), 8 CHRR D/4138, the board noted that in cases of this type, the Commission need not take steps to complete its investigation nor to "endeavor to effect a settlement" as required by subsection 33(l) of the *Code*....

In *Johnson v. East York (Board of Education)* (1988), 9 CHRR D/4791, the board, while approving *Ryckman*, did not address the implications of proceeding with a board of inquiry when the investigation of the complaint is not complete. The board was not willing to require a witness to produce documents that had been subpoenaed by the Commission at a hearing preliminary to the presentation of the Commission's case. The board based its decision on the phrase "in evidence at the hearing" as used in section 12 of the *S.P.P.A.*, and on the fact that "no factual basis for the introduction of these documents has been established at this stage."

The *Johnson* decision does not specify how much of the Commission's case would have to be presented to support an application for a *subpoena duces tecum*, nor address the difficulty that will arise for the Commission, in some cases, in identifying the appropriate person to be subpoenaed, without having seen the documents in question. Nor does it address the appropriate approach to be taken by a board in determining whether the subpoena describes the documents too broadly. On this latter point, presumably the board would have regard to the second and fourth points of the test in *Dalgliesh v. Basu*, [1975] 2 WWR 326 (Sask. Q.B.):

Greater latitude will be permitted in describing the documents *where there is no prior compulsory discovery of documents and where voluntary disclosure has been refused*. The issues involved in the proceedings must be considered. The broader the scope of the hearing, "the greater should be the permissible breadth of the subpoena duces tecum." [Author's emphasis]

While it may be an unconventional method of investigating a complaint, it appears that the Commission is entitled to simply have a hearing set up before the Board of Inquiry when documents are refused. I have carefully examined the portions of the Summons in light of the considerations outlined in the above discussion -- the fact that documents were refused by the City, the fact that the complaint is one that alleges constructive discrimination over a long period of time culminating in the denial of two positions to the complainant in 1988, and the fact that the requested documents are described with as much specificity as can be expected under the circumstances -- and I have concluded that, in the absence of any other considerations that would compel me to quash the Summons, the Commission is entitled to use the Summons to compel disclosure of these documents.

An obvious question is why it apparently took several years for the Commission to decide on this route of appointing a board of inquiry in order to complete its investigation. However, this question is an aspect of the delay and procedural unfairness argument that the City has not yet made. I agree with Commission counsel that disclosure of the documents sought in the Summons cannot by itself prejudice the City, if the documents still exist. This, though, does not answer the question of whether the City is prejudiced by the entire process of having to reconstruct job competitions that now go back 12 years. Again, the City has reserved its right to make that argument later in the hearing.

I conclude, then, that the Commission is entitled to pursue its investigation through the use of a Summons such as this. However, the documents sought must still meet the test of relevance, and there is an issue regarding the fairness of seeking documents that have never been requested, as well as confidentiality concerns. I will deal with these issues below.

Use of the Summons to compel documents that have never been requested

The City argues that it is unfair and an abuse of process for the Commission to seek documents through the Summons that it has never requested. The Commission acknowledges that it has never requested most of the information in Parts V and VI of the Summons, but essentially argues

that this would have been a futile gesture when the City was already refusing several requests for documents that clearly have a direct bearing on the case.

In my view, it is understandable that the Commission would not have bothered requesting the documents in Parts V and VI of the Summons. It appears that it would have been futile. A respondent should not be able to benefit from a refusal to co-operate with an investigation by later being able to claim that the Commission cannot request documents by Summons unless it has requested them earlier, when it is clearly very unlikely that the documents would have been given at the earlier stage.

I conclude that in these circumstances it is not improper for the Commission to seek through the Summons documents it has never requested.

Relevance of the Documents

The Summons is valid only if the documents requested are relevant to the subject matter of the proceeding (Section 12 (1) *S.P.P.A.*). The City has raised the question of relevance and has argued, correctly I believe, that if the documents requested in the disputed portions of the Summons do not meet the test of relevance, I should quash these portions of the Summons.

In defence of the request for the documents, Commission counsel notes that the complaint alleges constructive or adverse effect discrimination under what is now Section 11 of the *Human Rights Code*. The Commission is alleging that there is a pattern of events in the hiring and promotion of men in financial managerial positions in the City that results in a negative impact on women. Relevant to this allegation, the Commission says, are details of job competitions in which men were successful -- including the qualifications of the men who successfully applied for the various positions, the qualifications of those who were unsuccessful, and the criteria used for screening applications. An inquiry into the complaint requires an examination of hiring practices both before the complaint arose, and after, the Commission argues.

The City attacks the relevance of the information sought, saying it is either too old -- having arisen up to five years before the complaint was even filed -- or too new, having arisen up to five years after the complaint was filed.

If this complaint were simply an allegation of direct discrimination, I would agree with the City that job competitions before and after 1988 would be irrelevant. However, a complaint of

adverse effect discrimination necessarily involves an inquiry into a wider range of events than does a complaint of direct discrimination. The complaint does not simply allege that Ms. Potocnik was denied the two senior positions in 1988 because she is a woman, although it certainly does include that allegation. It also alleges that the entire hiring system in the City of Thunder Bay's financial department is loaded against women, and that this may be the reason she was denied the jobs. She is, of course, entitled to make this allegation under what is now Section 11 of the *Code*, and the Commission is entitled to investigate it and bring the allegation to a Board of Inquiry hearing.

In this context, I have little trouble deciding that evidence of job competitions dating back to 1983, as requested in the disputed portions of the Summons, are "relevant to the subject matter of the proceeding", to use the words of the *S.P.P.A.*, Section 12.

Somewhat more difficult is the question of relevance for documents relating to competitions arising after the complaint was filed. If Ms. Potocnik's complaint is that she was improperly denied two positions in 1988, how can a job competition in the same department four years later be relevant to an examination of that denial?

Commission counsel argues that the *course of conduct* essential to support the allegation of adverse effect discrimination under Section 11 of the *Code* can continue long after the complaint is lodged. The only test, he said, is relevance, and in an allegation of adverse effect discrimination where the system of hiring is under scrutiny, events after the complaint was lodged may be relevant to prove the existence of the flawed system, even if those events have no involvement of the complainant.

In support of this argument, Commission counsel cited legal texts and cases on the law relating to acceptance of similar fact evidence. This is a useful exercise, since in any case where an individual is trying to prove that a system is biased against a group of which he or she is a part, that undertaking will necessarily involve evidence that is akin to similar fact evidence. The test for acceptance of similar fact evidence in all the cases is relevance to the issues being decided. It does not appear to make a difference whether the facts arose after the actual events being complained of, as long as it is relevant to an issue being decided. Counsel pointed to the following passage in a civil case involving allegations of fraudulent misrepresentations,

When there is a real and substantial nexus or connection between the act or allegation made, whether it be a crime or a fraud (but not, of course, limited to those), and facts relating to previous or subsequent transactions are sought to be given in evidence,

then those facts have relevancy and are admissible not only to rebut a defence, such as lack of intent, accident, *mens rea* and the like, but to prove the fact of the act or allegations made. (*MacDonald et al v. Canada Kelp Co. Ltd. et al* (1973) 39 DLR (3d) 617, at p. 626 (B.C. Ct. of App.))

Commission counsel also drew my attention to *Entrop v. Imperial Oil Ltd.* (Ont. Bd. of Inq., Oct. 21, 1994), in which an interim ruling discusses evidence arising after the complaint was filed. The Board allows the evidence (however, in circumstances quite different from the present case), saying that it "simply relates to a single issue over a continuing time" (at page 2).

I also note that in her discussion of the use of similar fact evidence in human rights hearings, Ms. Keene (*Human Rights in Ontario*), Carswell, 1992, at page 342) says that in the case of *Olarte v. Commodore Business Machines* (1984) 49 O.R. (2d) 17 (Div. Ct.), similar fact evidence of sexual harassment subsequent to the time frame referred to in the complaint was admitted.

I see no logical reason to label automatically as irrelevant evidence arising after this complaint was filed. In this situation, evidence relating to job competitions held in the City's finance department after the complaint was filed may be useful in assessing the complaint's allegation that the hiring and promotion system was tainted.

The Summons as Discovery

Counsel for the City cited several authorities -- including the *Guru* case discussed above, and labour arbitration cases -- for the view that a summons cannot be used for prehearing discovery.

As discussed above, the Commission is permitted to use a Summons as an investigatory tool. This does not mean that the issuance of a Summons in the type of circumstances we have here requires the Respondent to disclose the documents before the hearing. There appears to be nothing in the *S.P.P.A.* or the *Code* giving the Commission the right to the type of pre-hearing disclosure that Respondents now have. Any documents compelled by Summons, assuming the Summons is not quashed, need not be produced until the appropriate time in the actual hearing. Of course, the Respondent may voluntarily grant preheating disclosure of subpoenaed documents to the Commission, knowing that the documents will come out at the hearing anyway and that it would often cause a delay if the Commission had not seen the material until the hearing.

I find support for these views in the case of *Lewis v. York Region Board of Education* (Ont. Bd. of Inquiry, Sept. 21, 1994), a detailed examination of the issue of disclosure by the Respondent to

the Commission. That ruling concludes that there is no right of pre-hearing discovery for the Commission similar to that given to Respondents by the *Northwestern Hospital* case. The ruling also confirms that the summons power under the *S.P.P.A.* requires documents to be produced only at the hearing, not beforehand, and points out that subsection 39 (4) of the *Human Rights Code* provides a method for dealing with the fact that some documents are being seen for the first time at the hearing. That section currently reads:

39(4) Where the board [of inquiry] exercises its power under clause 12 (1) (b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production in evidence of documents or things, it may, upon the production of the documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things.

In the *Lewis* case, the Board refused to order disclosure by the Respondent to the Commission, but added (at page 70) that "this is not a case where it was suggested that disclosure sought was withheld or where material sought was not obtained though no fault of the Commission. If there was some indication that documents sought had not been obtained for either of the noted reasons, there would be a basis for ordering further disclosure.

In conclusion, I agree with counsel for the City that the summons cannot be used for discovery. For that reason, I will not order pre-hearing disclosure of any of the documents described in Parts V and VI of the summons. However, for the reasons given above, I will not quash those parts of the Summons.

Confidentiality

Counsel for the City brought to my attention the case of *Re Alberta Human Rights Commission and Alberta Blue Cross Plan* (1983) 1 DLR (4th) 301 (Alta. Ct. of App.), which deals with the issue of confidentiality of personnel files other than those of the complainant. In that case, the request was for disclosure of a much wider range of material -- including the entire personnel files of employees -- than in this case. The ruling said there is no blanket rule of confidentiality that applies to personnel files, but added that there may be some documents in such files that are privileged.

Counsel for the City raised the issue of privacy and confidentiality, but did not go into much detail about what documents he believes should be protected and for what reason. At this point, I see no evidence that the material being sought strays into any sensitive areas where the documents

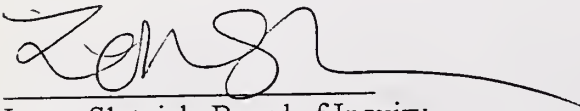
cannot be disclosed for reasons of privilege. I say this particularly since the documents described in the disputed portions of the summons appear to be on their face very similar in nature to the documents in Parts I and II -except that they relate to different job competitions -- and that the City has agreed to disclose the latter documents.

However, should the City wish to bring to my attention any document it feels it should not disclose for reasons of privilege, I will hear argument on that issue.

In addition, should the city decide that to expedite the hearing it will disclose documents described in Parts V and VI of the summons before the hearing, I order the complainant and Commission bound by the same conditions of confidentiality they agreed to respecting the documents in Parts I and II of the summons.

Conclusion

For the above reasons, I will not quash the Summons. I order disclosure of the Commission's record of investigation and the documents described in Parts I and II of the Summons by no later than Nov. 10, 1995, a little more than two weeks before the start of the hearing on the merits. I would also urge -- although for the reasons noted above I do not believe I have the power to order it -- pre-hearing disclosure by the City of the documents described in Parts V and VI of the Summons the City, in order to avoid the possibility of delays at the hearing stage.


Lorne Slotnick, Board of Inquiry

Oct 27, 1995
Date